APPENDIX A

1. Opinion of the Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16125

C. M. DOW, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Southern District of Texas.

(December 11, 1956.)

L. KEITH SIMMER, c/o Fulbright, Crooker, Freeman, Bates & Jaworski, Houston, Texas, for Appellant.

RICHARD C. PEET, Attorney, Department of Justice [with him on the brief were PERRY W. MORTON, Assistant Attorney General; MALCOLM R. WILKEY, United States Attorney, Houston, Texas; SCOTT W. KEY, Assistant United States Attorney, Houston, Texas; and ROGER P. MARQUIS, Attorney, Department of Justice], for Appellee.

Before RIVES, TUTTLE and CAMERON, Circuit Judges.

RIVES, Circuit Judge: This appeal is from a summary judgment dismissing C. M. Dow as a party defendant in a condemnation proceeding which, in accordance with Rule 54(b), F.R.C.P., was entered as a final and appealable judgment.

The United States commenced proceedings to condemn an easement for a pipe line right of way on March 9, 1943, and shortly thereafter went into possession of the easement pursuant to an order obtained

under the Second War Powers Act of 1942, 56 Stat. 177.[1] More than two years thereafter, on November 1, 1945, Dow acquired by deed, made subject to the condemnation proceedings, 617.289 acres of land which included 2.7139 acres within the right of way. Seven months thereafter, on May 31, 1946, the Government filed a declaration of taking and deposited estimated compensation for the taking of Parcel No. 1, the particular 2.7139 acres.[2]

---

[1] "* * * The Secretary of War * * * may acquire * * * by condemnation, any real property, temporary use thereof, or other interest therein * * *.

"Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law."

[2] Pursuant to 40 U.S.C.A. 258(a), providing in pertinent part as follows:

"In any proceeding * * * for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. * * *

"Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein * * *.

"Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just com-

Commissioners appointed by the Court under the Texas practice held a hearing at which Dow appeared and offered evidence as to value. The Commissioners' report awarded $4,500.00 as compensation for the taking of Parcel No. 1. Dow's vendors, or their heirs or representatives, were not served with notice, and did not appear at the compensation hearing. After the report, however, the Government's attorney reached the conclusion that Dow was not entitled to compensation for the taking of Parcel No. 1, and moved to set aside the award alleging that the parties entitled to compensation were neither served nor present at the commissioners' hearing; and moved also for a summary judgment dismissing Dow's claim on the ground that his deed was a prohibited assignment of a claim against the Government.[2]

Answering said motion, Dow reiterated his claim. Notwithstanding the fact that his vendors appeared and filed a waiver to any compensation due from the Government and requested that the award be paid to

---

pensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency."

[2] Under the Anti-Assignment Act, 31 U.S.C.A. 203, providing in pertinent part as follows:

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *."

Dow,[4] the motion for summary judgment dismissing Dow was granted and this appeal followed.

The sole question for decision is whether the act prohibiting assignment of claims against the United States bars Dow's claim to compensation, he having purchased after possession had been awarded in the proceedings but prior to the filing of a declaration of taking. Under the explicit provisions of the Anti-Assignment Statute, a claim to compensation for a taking of property cannot be voluntarily transferred after it has arisen.[5] Otherwise stated then, the question is whether the taking occurred and the claim arose when the United States went into possession of the easement pursuant to the order of possession,[6] or subsequently upon the filing of the declaration of taking and of the deposit in the court.[7]

---

[4] By leave of the court, requested just before and granted after Dow had been dismissed, this appearance and disclaimer were withdrawn. The findings of fact accompanying Dow's dismissal recited that his vendors "appeared in this proceeding and made known to the Court that their conveyance of November 1, 1945, to C. M. Dow was intended by them to include all their right, title and interest in the said Parcel No. 1 or in the award to be made for same."

[5] See, e.g., United States v. Shannon, 342 U.S. 288 * * *; 23 Tracts of Land, etc. v. United States, 177 F. 2d 967 (6th Cir.).

[6] Providing in part:

"Leave * * * is hereby granted the United States of America to take immediate possession of said land * * * *to the extent of the interest to be acquired by the United States of America* * * *." (Emphasis supplied.)

[7] The judgment entered thereon provided:

"It is therefore, ORDERED, ADJUDGED and DECREED that upon the filing of said Declaration of Taking, and the depositing in the Registry of this Court of the sum of $3801.30, a perpetual right of way or easement for the construction, operation, maintenance, patrol, repair, replacement and removal of

The Government insists that when it took possession there was a taking of the property, and that thereupon the claim to compensation arose. Concededly, however, the United States was free to abandon the condemnation at any time before filing its declaration of taking.[8] In such an event, the United States would have become liable for actual use and occupancy with restoration damage.[9] Such liability did not actually accrue. Instead, upon the filing of the declaration of taking the United States became irrevocably committed to the payment of the ultimate award.[10] The Government then took title to the easement, whereupon the claim for compensation arose and vested in the owner, Dow. Theretofore the taking was not complete. Cf. *United States* v. *Dickinson*, 331 U.S. 745, 749 * * *.

The Declaration of Taking Act fixed a definite time of taking and of accrual of the claim for compensation and removed much of the uncertainty theretofore existing.[11] Nothing herein said is inconsistent with,

---

a pipe line * * * vested in the United States of America * * * and said lands are deemed to have been condemned and taken for the use of the United States of America, *and the rights to just compensation for the property taken, upon the filing of said Declaration of Taking and making of said deposit, vested in the persons entitled thereto* * * *." (Emphasis supplied.)

[8] O'Connor v. United States, 9th Cir., 155 F. 2d 425; Moody v. Wickard, D.C. Cir., * * * 136 F. 2d 801; United States v. One Parcel of Land, D.C. Cir., 131 F. Supp. 443.

"Until taking, the condemnor may discontinue or abandon his effort." Danforth v. United States, 308 U.S. 271, at p. 284 * * *.

[9] Cherokee Nation v. South Kansas Ry. Co., 135 U.S. 641, 660 * * *, and authorities cited in Footnote 4, supra.

[10] 40 U.S.C.A. 258(e); Catlin v. United States, 324 U.S. 229, 241, 242 * * *.

[11] See Danforth v. United States, 308 U.S. 271, 283-284 * * *; United States v. .8677 Acre of Land in Richland County, 42 F. Supp. 91; United States v. 40,379 Square Feet of Land, 58 F. Supp. 246, 6 Nichols, "Eminent Domain", § 27.25, p. 331.

or is meant to change, the equitable rule that where the declaration of taking is filed on a date subsequent to the passing of possession to the Government, the value of the property should be determined as of the date possession was acquired.[12]

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

REVISED AND REMANDED.

2. Judgment of the Court of Appeals

Extract from the Minutes of December 11, 1956.

No. 16125.

C. M. DOW,

VERSUS

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court.

* * * * *

APPENDIX B

Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, provides:

> The Act of July 2, 1917 (40 Stat. 241), entitled "An Act to authorize condemnation proceedings of lands for military purposes," as amended, is

[12] 11,000 Acres of Land, etc. v. United States, 5th Cir., 152 F. 2d 566; Anderson v. United States, 5th Cir., 179 F. 2d 281.

hereby amended by adding at the end thereof the following section:

"SEC. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended."

The relevant portions of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. 258(a)-258(e), are as follows:

SEC. 1. In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement

or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be

allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

* * * * *

SEC. 4. The right to take possession and title in advance of final judgment in condemnation proceedings as provided by this Act shall be in addition to any right, power, or authority ~~conferred by the laws of the United~~ States or those of any State or Territory under which such proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power, or authority.

SEC. 5. In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United States has become irrevocably committed to pay the amount ultimately to be awarded

as compensation, it shall be lawful to expend moneys duly appropriated for that purpose in demolishing existing structures on said land and in erecting public buildings or public works thereon, notwithstanding the provisions of Section 355 of the Revised Statutes of the United States: *Provided,* That in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein.

The pertinent provisions of the Anti-Assignment Act, 31 U.S.C. 203, are as follows:

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, [except as hereinafter provided], shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *

☆ U. S. GOVERNMENT PRINTING OFFICE 1957—422208/P.O. 1072